No. 77-1715

Supreme Court, U. S.
FILED
SEP 1 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

SECRETARY OF PUBLIC WELFARE, Commonwealth of Pennsylvania, ALDO COLAUTTI; JOHN FONG, Director of Haverford State Hospital; NICHOLAS D'ALUISIO, Director of Polk State School and Hospital; D. DUANE YOUNGBERG, Director of Pennhurst State School and Hospital, sued as representative of all others similarly situated,

Appellants,

vs.

INSTITUTIONALIZED JUVENILES in Pennsylvania Institutions for the mentally ill and mentally retarded, namely, KEVIN S.; RICHARD S.; JAMES PAUL M.; EDWARD B.; RAYMOND C.; WILLIAM B.; FRANCIS B.; MARIE L.; THOMAS W.; NANCY LOUISE D.; GINA S.; and GEORGE S., by their next friend and guardian ad litem, David Ferleger, individually and on behalf of all others similarly situated,

Appellees.

Appeal From The Judgment Of The United States District Court For The Eastern District Of Pennsylvania

BRIEF OF NATIONAL CENTER FOR LAW AND THE HANDICAPPED, AMERICAN COALITION OF CITIZENS WITH DISABILITIES, NATIONAL ASSOCIATION FOR RETARDED CITIZENS, AND EPILEPSY FOUNDATION OF AMERICA AMICI CURIAE

RONALD M. SOSKIN
National Center for Law and the Handicapped
1235 North Eddy Street
South Bend, Indiana 46617
Counsel for Amici Curiae

Of Counsel:
BRIAN J. LINN

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

SUBJECT INDEX

PAGE

Interest of *Amici Curiae* 1

Question Presented by *Amici* 3

Statement of the Case 3

Summary of Argument 5

Argument 10

I. Civil Commitment Infringes Upon An Individual's Fundamental Interest In Liberty, Thus Necessitating The Application Of Due Process Protections Including The Right To A Hearing 10

A. Civil Commitment Seriously Abridges a Minor's Fundamental Interest in Liberty 11

1. The Court Has Previously Recognized the Deprivation of Liberty Which Occurs as a Result of the Commitment Process 11

2. The Liberty Interest Affected by Civil Commitment Is as Substantial as the Liberty Interest Infringed Upon in Other "Civil" Proceedings Involving Minors 14

B. The Right To Be Heard Is an Integral Component of Due Process Which Has Been Consistently Required by the Court Prior to the Deprivation of Liberty and/or Property Interests 17

II. The Provision Of A Hearing Is Mandated By Balancing The Minor's Interests And The Risk Of An Erroneous Deprivation Of Liberty Against The Governmental Interest In Civilly Committing The Minor To An Institution 22

PAGE

A. Commitment of a Minor to an Institution Deprives the Individual of the Fundamental Right to Freedom, Adversely Stigmatizes Him or Her for Life, and Abridges Numerous Other Constitutionally Protected Rights 22

B. The Provision of Hearings Will Minimize the Risk of Erroneous Commitments of Minors to Institutions 27

1. Psychiatry and Psychology Are Inexact Sciences 28

2. The Decision to Commit Is Based Upon an Analysis of Factual Information, and Exclusive Reliance Upon Expert Determinations Is Improper 32

3. Hearings Can Overcome the Exclusive Reliance Upon Institutional Solutions in Commitment Proceedings By Causing an Exploration of Less Restrictive Alternatives Which May Be More Appropriate to the Needs of a Mentally Disabled Child 36

C. The State's Parens Patriae Interests Substantially Coincide with the Individual's Liberty Interests, and the State's Interests in Economy and in Preserving the Family Unit Are Minimal; Thus, Balancing All of the Interests Affected By Civil Commitment Requires the Provision of Hearings 40

1. The Provision of Hearings Will Not Interfere with the State's Interest in the Maintenance of the Family Because the Parental Decision to Seek the Commitment of a Child to an Institution Has Already Weakened the Family Unit 42

PAGE

2. The State's Interest in Governmental Economy Is Illusory Because the Incremental Cost of Providing Automatic Hearings Will Be Marginal 46

III. The State System Governing The Commitment Of Minors Does Not Suffice As A Substitute For Requiring Hearings And Frustrates The Goal Of Pursuing The Best Interests Of Handicapped Children 48

A. Neither the Denial of Access to a Hearing Nor the Placement of the Burden of Affirmatively Exercising the Right to Request a Hearing Upon the Child or an Undetermined "Responsible Party" Provides Sufficient Protections for the Minor's Interests 48

B. The Safeguards Claimed by the State in Requiring a Referral from a Professional and a Review by the Director of the Institution Do Not Constitute an Adequate Substitute for a Due Process Hearing 52

C. The Informal System Created by the State for the Commitment of Minors without Mandatory Due Process Hearings Encourages the Widespread Usage of Institutionalization, Which Is Contrary to the Best Interests of Handicapped Children 56

Conclusion 58

TABLE OF AUTHORITIES

Cases

PAGE

Arnette v. Kennedy, 416 U.S. 134 (1974) 20

Bartley v. Kremens, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded,* 431 U.S. 119 (1977) ..4, 51

Baxstrom v. Herold, 383 U.S. 107 (1966) 17, 18

Bell v. Burson, 402 U.S. 535 (1971) 20

Bell v. Wayne County Hospital, 384 F. Supp. 1085 (E.D. Mich. 1974) 35

Belloti v. Baird, 428 U.S. 132 (1976) 43

Board of Curators of University of Missouri v. Horowitz, ... U.S. ....., 98 S. Ct. 948 (1978) 33, 34

Board of Regents v. Roth, 408 U.S. 564 (1972) ..10, 11, 20, 27

Bolling v. Sharpe, 347 U.S. 497 (1954) 19

Breed v. Jones, 421 U.S. 519 (1975) 16

Carey v. Population Services International, 431 U.S. 678 (1977) 40

Diana v. California State Board of Education, C.A. No. C-70 37 RFD (N.D. Cal. 1970) 30

Dixon v. Attorney General of the Commonwealth of Pennsylvania, 325 F. Supp. 966 (M.D. Pa. 1971) 36

Dixon v. Weinberger, 405 F. Supp. 974 (D.D.C. 1975) 36

Doe v. Hampton, No. 76-1090 (D.C. Cir. Sept. 14, 1977) 24

Doe v. New York University, 442 F. Supp. 522 (S.D. N.Y. 1978) 25

Doremus v. Farrell, 407 F. Supp. 509 (D.Neb. 1975) 35

PAGE

Fuentes v. Shevin, 407 U.S. 67 (1972) 20

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 19

Goldberg v. Kelly, 397 U.S. 254 (1970) 20

Goldy v. Beal, 429 F. Supp. 640 (M.D. Pa. 1976) 35

Goss v. Lopez, 419 U.S. 565 (1975) 19, 32, 33, 34

Griswold v. Riley, No. CIV 77-144 PHX-CAM (D. Ariz. July 15, 1977) 13

Halderman v. Pennhurst State School and Hospital, 446 F. Supp. 1295 (E.D. Pa. 1977) 13, 36, 47

Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968) 16

Horacek v. Exon, 357 F. Supp. 71 (D. Neb. 1973) 13

Humphrey v. Cady, 405 U.S. 504 (1972) 6, 13

In re Ballay, 482 F.2d 648 (D.C. Cir. 1973) 13, 23, 24

In re Gault, 387 U.S. 1 (1967) ..6, 13, 14, 15, 16, 17, 25, 34, 40

In re Winship, 397 U.S. 358 (1970) 6, 15, 16, 17, 23, 34

Institutionalized Juveniles v. Secretary of Public Welfare, No. 72-2272 (E.D. Pa. May 25, 1978), *prob. juris. noted,* ..... U.S. ....., 98 S. Ct. 3087 (1978) 51

Jackson v. Indiana, 406 U.S. 715 (1972) 6, 13, 17, 18, 35

J.L. and J.R. v. Parham, 412 F. Supp. 112 (M.D. Ga. 1976), *prob. juris. noted,* 431 U.S. 936 (1977), *reargument ordered,* ..... U S. ....., 98 S. Ct. 761 (1978) 22, 23, 36

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 27

Kent v. United States, 383 U.S. 541 (1966) 40

PAGE

Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974) 30

Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded*, 414 U.S. 473 (1974), *reinstated*, 379 F. Supp. 1376 (E.D. Wis. 1974), *remanded*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976) 23, 24, 35, 36, 39

Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974) ..35, 36

Mathews v. Eldridge, 424 U.S. 319 (1976) 10, 21

Meyer v. Nebraska, 262 U.S. 390 (1923) 11, 42

Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940) 35

Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) 11, 42

Morrissey v. Brewer, 408 U.S. 471 (1972) 13, 19

Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) 27

New York State Association for Retarded Citizens v. Rockefeller (Carey), 357 F. Supp. 752 (E.D.N.Y. 1973) and 393 F. Supp. 715 (E.D.N.Y. 1975) 13, 36

O'Connor v. Donaldson, 422 U.S. 563 (1975) ..6, 12, 32, 35, 36

Perry v. Sindermann, 408 U.S. 593 (1972) 20

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 8, 40, 43, 44

Prince v. Massachusetts, 321 U.S. 158 (1944) 40, 41

Shelton v. Tucker, 364 U.S. 479 (1960) 36

Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977) 42, 44

Speiser v. Randall, 357 U.S. 513 (1958) 13

PAGE

Spencer v. Toussaint, 12 E.P.D. ¶11,112 (E.D. Mich. 1976) 24

Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Ia. 1976) 35, 36

Stanley v. Illinois, 405 U.S. 645 (1972) 42

State v. Addington, 557 S.W.2d 511 (Tex. 1977), *prob. juris. noted*, ... U.S. ....., 98 S. Ct. 1604 (1978) (No. 77-5992) 5, 10, 56

State ex rel. Memmel v. Mundy, No. 441-417 (Cir. Ct. Wis. August 8, 1976), *appealed on other grounds*, 75 Wis. 2d 276, 249 N.W.2d 573 (1977) 57

Stump v. Sparkman, ... U.S. ....., 98 S. Ct. 1099 (1978) 46

Suzuki v. Alba, 438 F. Supp. 1106 (D. Haw. 1975) 35

Suzuki v. Quisenberry, 411 F.Supp. 1113 (D. Haw. 1976) 36

Tinker v. Des Moines School District, 393 U.S. 503 (1969) 23

Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, remanded in part*, 550 F.2d 1122 (8th Cir. 1977) 36

Wisconsin v. Yoder, 406 U.S. 205 (1972) 41, 42, 43

Wolff v. McDonnell, 418 U.S. 539 (1974) 20

Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub. nom.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) 36

Statutes

PAGE

Community Mental Health Centers Construction Act of 1963 and Amendments of 1975, 42 U.S.C. § 2689 37

Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010 38

Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq. 25, 26

Housing and Community Development Act of 1974, 42 U.S.C. § 1437(2) 38

Mental Health Study Act of 1955, ch. 417, § 3, 69 Stat. 382 37

Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. ..24, 25, 38

Special Health Revenue Sharing Act of 1975, 42 U.S.C. § 246 ..... 37, 38

Title XX of the Social Security Act, 42 U.S.C. § 1397 38

Books and Articles

Albers, Pasewark and Meyer, *Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of the Doctrine of Immaculate Perception,* 6 Cap. U.L. Rev. 11 (1976) 29

Allen, Legal Rights of the Disabled and Disadvantaged (1969) 31, 53

Bazelon, Boggs, Hilleboe, and Tudor, Report of the Task Force on Law: The President's Panel on Mental Retardation (1963) 50

Beck, Ward, Mendelson, Mock and Erbaugh, *Reliability of Psychiatric Diagnosis: A Study of Consistency of Clinical Judgments and Ratings,* 119 Am. J. Psychiat. 351 (1962) 29

PAGE

Blatt, Souls in Extremis: An Anthology on Victims and Victimizers (1973) 56

Burger, *Psychiatrists, Lawyers, and the Courts,* 28 Fed. Prob. 37 (1964) 28

Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives,* 70 Mich. L. Rev. 1107 (1972) 12, 37, 39

Cohen, *Advocacy,* in President's Committee on Mental Retardation, The Mentally Retarded Citizen and the Law (Kindred ed. 1976) 48

Commission For the Control of Epilepsy and its Consequences, The Plan for Nationwide Action on Epilepsy (1977) 56

Comptroller General of the United States, Report to the Congress—Returning the Mentally Disabled to the Community: Government Needs to Do More (1977) 37, 38

Conley, The Economics of Mental Retardation (1973) 47

Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions,* 23 J. Leg. Educ. 24 (1970) 55

Deutsch, Katz, and Jensen, Social Class, Race and Psychological Development (1968) 30

Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions,* 62 Calif. L. Rev. 840 (1974) 54

Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom,* 62 Calif. L. Rev. 693 (1974) 28

Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267 (1975) 19

PAGE

Goffman, Asylums (1961) 24

Goldstein, Freud and Solnit, Beyond the Best Interests of the Child (1973) 26, 46

Hobbs, The Future of Children (1975) 30, 31, 46

Holladay, *Due Process Limitations on Parental Rights to Commit Children to Mental Institutions,* 48 U. Colo. L. Rev. 235 (1977) 25

Joint Commission on Mental Health of Children, Crisis in Child Mental Health: Challenge for the 1970's (1969) 46

Kay, Farnham, Karren, Knakal and Diamond, *Legal Planning for the Mentally Retarded: The California Experience,* 60 Calif. L. Rev. 438 (1972) 31, 52

Kelly and Menolascino, *Physicians' Awareness and Attitudes Toward the Retarded,* Mental Retardation, Vol. 13, No. 6, at 13 (Nov./Dec. 1975) 54

Knowlton, *Group Homes,* in National Association for Retarded Citizens, National Forum on Residential Services 117 (1976) 38

Kugel, *Introduction,* in President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded (Kugel and Shearer, eds. 1976) 56

Linn and Bowers, *Analyzing the Legal Prohibitions Against Marriages Involving Mentally Retarded Persons—The Eternal Child Grows Up,* 13 Gonz. L. Rev. 625 (1978) 31

Menolascino, Challenges in Mental Retardation (1977) 38, 50, 53, 54

PAGE

Mercer, *The Myth of 3% Prevalence,* in Sociobehavioral Studies in Mental Retardation (Tarjan, Eyman & Meyers, eds. 1973) 31

National Association for Retarded Citizens, Facts on Mental Retardation (1973) 30

National Association for Retarded Citizens, National Forum on Residential Services (1976) 38

National Juvenile Law Center, Legal Challenge to the "Voluntary" Admission of Children to Mental Institutions, Vol. II (1976) 51

Note, *Developments in the Law—Civil Commitment of the Mentally Ill,* 87 Harv. L. Rev. 1190 (1974) 23, 24, 39, 42

Person, *The Accused Retardate,* 4 Col. Hum. Rts. L. Rev. 239 (1972) 50

Peterson and Seo, *Bayesian Analysis of Overprediction of Insanity,* 34 Psychol. Rep. 207 (1974) 55

President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded (Kugel and Shearer, eds. 1976) 38, 56

President's Committee on Mental Retardation, The Mentally Retarded Citizen and the Law (Kindred ed. 1976) 48

President's Committee on Mental Retardation, The Six Hour Retarded Child (1976) 31

President's Panel on Mental Retardation, A Proposed Program for National Action to Combat Mental Retardation (1962) 37

Report of the Joint Commission on Mental Illness and Health, Action for Mental Health (1960) 37

Rosenhan, *On Being Sane in Insane Places,* 13 Santa Clara Lawyer 379 (1973) 24, 29

PAGE

Scheerenberger, Deinstitutionalization and Institutional Reform (1976) 25, 30, 35, 46, 52

Soskin, *The Least Restrictive Alternative: In Principle and in Application,* Amicus, Vol. 2, No. 6, at 28 (Nov. 1977) 37

Stone, Mental Health and Law: A System in Transition (1975) 26, 30, 39, 42, 55, 57

Teitelbaum and Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application,* 12 Fam. L.Q. 153 (1978) 24, 25, 40, 44, 45, 51, 52

Telford and Sawrey, The Exceptional Individual (1967) 31

Ziskin, Coping With Psychiatric and Psychological Testimony (2nd ed. 1975) 29

In the Supreme Court of the United States

No. 77-1715

SECRETARY OF PUBLIC WELFARE OF PENNSYLVANIA et al.,

Appellants,

vs.

INSTITUTIONALIZED JUVENILES et al.,

Appellees.

Appeal From The Judgment Of The United States District Court For The Eastern District Of Pennsylvania

BRIEF OF NATIONAL CENTER FOR LAW AND THE HANDICAPPED, AMERICAN COALITION OF CITIZENS WITH DISABILITIES, NATIONAL ASSOCIATION FOR RETARDED CITIZENS, AND EPILEPSY FOUNDATION OF AMERICA AMICI CURIAE

INTEREST OF AMICI CURIAE

Amici curiae are organizations of handicapped persons, parents and professionals who are dedicated to ensuring the equal rights of handicapped persons through advocacy and educational services. All of these organizations have been involved in efforts to establish the delivery of appropriate services to children and adolescents.

Through their combined expertise, *amici* have provided information, authorities and argument in an attempt to

assist the Court in deciding the extremely important and complex issue presented in the case at Bar. *Amici* especially wish to assist the Court by placing the issues presented in their proper perspective and by suggesting what the ramifications of the Court's decision may be upon handicapped children.

The National Center for Law and the Handicapped is a research, advocacy and educational organization concerned with questions involving the legal rights of handicapped persons. It is sponsored by the Family Law Section of the American Bar Association, the National Association for Retarded Citizens, the University of Notre Dame School of Law, and the Council for the Retarded of St. Joseph County, Indiana. The Center assists attorneys, organizations and individuals through direct participation in cases and through research and consultation. Assistance is often provided to courts by the filing of *amicus curiae* briefs.

The American Coalition of Citizens with Disabilities is the largest national organization directed by disabled people to advocate on behalf of disabled Americans in all aspects of life and, in particular, on behalf of the civil and human rights of disabled persons. The Coalition is an umbrella organization consisting of seventy-five member associations of and for disabled people with a combined membership exceeding seven million.

The National Association for Retarded Citizens, with 300,000 adult members and over 1800 local chapters, is a voluntary organization devoted to promoting the welfare of mentally retarded children and adults. The Association represents a membership with interests and involvement in both institutional and community services issues. It makes available its information and expertise to assist individuals, professionals, organizations and the judicial system.

The Epilepsy Foundation of America is a non-profit organization established to advance the interests of the two million Americans with epilepsy through research, vocational programs, legal advocacy, professional awareness and public education programs. The Foundation's staff provides assistance to attorneys, legislators and organizations working in areas involving epilepsy through consultation, research, and testimony, and the Foundation attempts to assist courts by participating in selected cases as *amicus curiae.*

Amici have received consent from both the appellant and the appellee to file this brief.* Their consents are on file with the Clerk of the Supreme Court.

QUESTION PRESENTED BY AMICI CURIAE

Whether a state, which through its statutes permits a parent or guardian to civilly commit a minor to an institution for the mentally ill or mentally retarded, must, consistent with the due process clause of the fourteenth amendment, provide the child with a hearing on the need for commitment?

STATEMENT OF THE CASE

Plaintiff class members are mentally ill children below the age of fourteen and mentally retarded children below the age of nineteen, who have been committed to institutions for the mentally ill or mentally retarded by their parents or guardians pursuant to Pennsylvania statutes. A three-judge District Court for the Eastern District of Pennsylvania held the applicable statutes unconstitutional

---

* The parties originally consented to the filing of an *amicus* brief by the National Center for Law and the Handicapped. Subsequently, they were informed of the participation by the other *amici*, and the parties raised no objections to their participation in the filing of this brief.

as violative of the due process clause of the fourteenth amendment because the statutes failed to provide these children with hearings as to their need for institutionalization. The decision followed closely a previous determination by the same court which had been vacated and remanded as moot, because of legislative changes in the state's statutes and regulations subsequent to the first decision. *Bartley* v. *Kremens,* 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded,* 431 U.S. 119 (1977).

The Pennsylvania statutes and regulations currently permit the institutional commitment of a mentally ill child by his or her parents or guardians. Within seventy-two hours of admission, the institution must formulate a treatment plan and justify the child's need for treatment. The child cannot request his or her release and receives no automatic hearing to determine the need for commitment. If a "responsible party" believes the child should not be institutionalized, he or she may petition the court for a hearing.

A mentally retarded child may be committed to an institution by parents or guardians with a referral from a pediatrician, general physician or psychologist. The admission must be reviewed by the director of the institution or his or her delegate. The child cannot request his or her release and receives no automatic hearing to determine the need for commitment. Each such child who is at least thirteen years of age is given notification of his or her rights within twenty-four hours of commitment and the telephone number of an attorney who can be called for representation. If the child or the attorney objects to institutionalization, a hearing on the need for commitment must be scheduled.

The district court ruled these procedures unconstitutional and enjoined their application. The court ruled that

the class of juveniles subject to commitment is entitled to: prior written notice; counsel or trained lay representative; personal presence with opportunity to be heard, to present evidence and testimony of witnesses, and to confront and cross-examine adverse witnesses; a standard of proof of clear and convincing evidence; a probable cause hearing within seventy-two hours; and, a full commitment hearing within two weeks of initial detention. The court noted that a waiver of these rights, except for notice and counsel, could be accepted by a neutral tribunal from a competent minor, after consultation with counsel, or from counsel on behalf of a minor not competent to act.

The decision was appealed and probable jurisdiction was noted by the Court, ... U.S. ....., 98 S. Ct. 3087 (1978).

SUMMARY OF ARGUMENT

The application of due process protections to a minor who is civilly committed to an institution through the actions of a parent or guardian must be determined by analyzing and balancing the interests affected by the process. In this brief, *amici* focus upon the threshold question of the necessity of a due process hearing and urge the Court to rule that due process requires such a hearing. *Amici* do not discuss the specific procedural components which the hearing should include, other than to urge the affirmance of the decision of the court below on the basis that the procedural protections granted therein are consistent with due process and do not unduly infringe upon the state's interests. *Amici* believe that the Court should wait for subsequent opportunities to consider the full extent of the fourteenth amendment's impact upon the civil commitment process. *E.g. State* v. *Addington,* 557 S.W. 2d 511 (Tex. 1977), *prob. juris. noted,* ..... U.S. ....., 98 S. Ct. 1604 (1978) (No. 77-5992) (appropriate standard of proof in civil commitments).

In Part I of this brief, *amici* discuss the minor's liberty interest which is abridged by civil commitment. *Amici* argue that this liberty interest clearly invokes the application of the due process clause of the fourteenth amendment. The Court has on numerous occasions recognized the serious consequences which the civil commitment process places upon a person's liberty. *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975); *Jackson* v. *Indiana,* 406 U.S. 715 (1972); *Humphrey* v. *Cady,* 405 U.S. 504 (1972). As the Court has recognized in its decisions involving the juvenile court system, the liberty interest is not diminished by merely labeling the procedures "civil." *Amici* contend that the deprivation of a minor's liberty through civil commitment is substantially similar to the deprivation of a minor's liberty in juvenile delinquency proceedings, where the Court has invoked the application of due process protections. *Cf. In re Winship,* 397 U.S. 358 (1970); *In re Gault,* 387 U.S. 1 (1967).

As an integral part of due process, the Court has consistently required a hearing prior to the abridgement of fundamental interests involving liberty and property. In juvenile cases and in adult civil commitments, the necessity of full judicial hearings has been recognized. But even in situations involving interests much less substantial, the Court has established the basic requirement of a hearing. Thus, revocation of parole or probation, termination of welfare benefits, suspension from public school, and termination of tenured employment are but a few of the situations in which the Court has mandated hearings. *Amici* submit that the minor's significant liberty interest in the case at Bar is as compelling as other interests for which hearings are required under the fourteenth amendment.

Having outlined the importance of the minor's liberty interest, Part II of this brief turns to the balancing of

the competing interests in the commitment process: the private liberty interest, the risk of an erroneous deprivation of that interest, and the state's interest. *Amici* contend that the child's liberty interest is fundamental and that the risk of an erroneous deprivation of that interest is high. It is argued that a due process hearing would substantially protect the private interest, as well as greatly assist in minimizing the risk of error. On the other hand, *amici* illustrate that the governmental interest is minimal and therefore, on balance, a hearing should be mandated.

The minor's interest in being free from bodily restraint in its most basic form is obvious. Commitment results not only in this loss of freedom, but also in the loss of numerous other basic rights, including first amendment rights. In addition, the adverse collateral aspects of institutionalization are significant. An institutionalized child faces loss of developmental skills, psychological deprivations, and stigmatization; institutionalization can negatively affect an individual's future life, including his or her educational and employment opportunities.

Yet, these serious ramifications arise from a process fraught with the possibility of error. *Amici* submit information illustrating that psychiatry and psychology are not exact sciences; thus, the diagnosis of a child as mentally ill or the labeling of a child as mentally retarded may be erroneous or misleading. *Amici* then illustrate that the decision to commit is a fact-finding process and not merely a determination made by experts. The existence of a mental disability is only a threshold requirement for commitment; facts, which are often subjective and disputable, indicating the specific behavior or actions of the child are the key to the determination of the need for commitment. In addition, in order to minimize the risk of error, a full exploration of alternatives to commitment is needed to

ensure that a child does not suffer the adverse effects of institutionalization when a more appropriate placement exists. *Amici* argue that these kinds of findings are uniquely suited to determination in a hearing.

Weighing against the requirement of hearings are certain governmental interests, including the preservation of the family unit and fiscal concerns. However, *amici* argue that these interests are minimal and that the state's parens patriae concerns for handicapped children support the desirability of hearings. Under its parens patriae power, the state must act in the best interests of the child. Thus, in considering the commitment of the child, the state's interest is in protecting the child's liberty and in preventing harm to the child by minimizing the risk of inappropriate commitment.

The arguments favoring due process hearings are not overcome by the state's interest in preserving the family unit. Once the parental decision is made to disrupt the family unit through commitment of the child, the integrity and the cohesiveness of the family unit have been significantly weakened. *Cf. Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52 (1976).

As for fiscal implications, *amici* submit that the state has already established procedures for civil commitment hearings; therefore, *amici* argue that spiraling costs may not necessarily result from an affirmance of the lower court's decision. *Amici* also point out that the lower court envisioned the waiver of the right to a hearing in certain situations. Finally, even if more hearings result from this Court's ultimate determination, *amici* assert that, because the hearing process will insure against erroneous institutional commitments, any increase in the administrative cost of providing hearings will be offset by the sav-

ings realized in the state's expenditures for institutional care.

In Part III of this brief, *amici* examine the commitment system currently provided by the state and argue that it is an insufficient substitute for a due process hearing. The procedures, which place a burden upon the child, or in some circumstances upon an undetermined "responsible person," to initiate hearing requests, do not provide adequate due process protections. *Amici* contend that for many institutionalized children, these procedures are virtually meaningless. Merely requiring a physician's referral and a review by the institutional director does not suffice. *Amici* illustrate that these requirements are not meaningful because physicians of all specialties are frequently not knowledgable about the needs of a handicapped child; therefore, they lack the expertise to make informed decisions in the child's best interests. Additionally, the institutional director, who frequently acts through a delegate, is not in a position to objectively review the proposed commitment when faced with the parent(s)' application for institutionalization.

Finally, *amici* assert that sanctioning the state's informal commitment procedures will have unfortunate consequences for handicapped children, by permitting the commitment of children when institutionalization is not in their best interests. *Amici* fear that the widespread usage of institutionalization will continue to occur without the establishment of a formal procedural mechanism, wherein the necessity for commitment and the availability of more appropriate community alternatives are carefully scrutinized. *Amici* believe that hearings are the only appropriate procedural mechanism to insure against the deprivation of basic rights, the suffering of irremedial harm, and the stigmatization for life which can unnecessarily result from the civil commitment of children.

ARGUMENT

I.

CIVIL COMMITMENT INFRINGES UPON AN INDIVIDUAL'S FUNDAMENTAL INTEREST IN LIBERTY, THUS NECESSITATING THE APPLICATION OF DUE PROCESS PROTECTIONS INCLUDING THE RIGHT TO A HEARING.

The determination of that process which is due under the requirements of the due process clause of the fourteenth amendment requires an analysis and balancing of the competing interests of the parties.[1] *Mathews* v. *Eldridge,* 424 U.S. 319 (1976). However, prior to reaching the need to weigh these various interests, a threshold inquiry must be made to determine whether the interest which seeks due process protection falls within the scope of the fourteenth amendment's concept of liberty and property. *Board of Regents* v. *Roth,* 408 U.S. 564 (1972).

[1] This case involves only the issue of whether the relief ordered by the lower court is a constitutionally permissible infringement upon Pennsylvania's legislative scheme for civil commitments. Thus, this Court need only address the question of whether the hearing procedures ordered below are consistent with the fourteenth amendment's proscription of liberty deprivations by the states.

The desirability of more stringent safeguards, such as judicial hearings (rather than administrative hearings), mandatory provision of legal counsel (rather than lay advocates), or a reasonable doubt standard of proof (rather than a clear and convincing evidence standard) are not matters which are at issue in the case at Bar. The full extent of the specific requirements of due process should be addressed in future cases. *E.g. State* v. *Addington,* 557 S.W.2d 511 (Tex. 1977), *prob. juris. noted,* ..... U.S. ....., 98 S. Ct. 1604 (1978) (No. 77-5992) (appropriate standard of proof in civil commitments).

Over a half-century ago, the Court enunciated a far-reaching approach to the fourteenth amendment's protection of "liberty."

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. *Nebraska,* 262 U.S. 390, 399 (1923) (citations omitted). More recently Justice White has reaffirmed this expansive view of "liberty." "In a constitution for a free people there can be no doubt that the meaning of 'liberty' must be broad indeed." *Moore* v. *City of East Cleveland, Ohio,* 431 U.S. 494, 546 (1977) (White J., dissenting), citing *Board of Regents* v. *Roth,* 408 U.S. 564, 572 (1972).

Amici assert that the individual's interest in liberty is sufficiently infringed upon by civil commitment to require the application of procedural due process which mandates the right to a hearing.

A. Civil Commitment Seriously Abridges a Minor's Fundamental Interest in Liberty.

1. The Court Has Previously Recognized the Deprivation of Liberty Which Occurs as a Result of the Commitment Process. While the Court has never directly ruled on the substantive or procedural requirements which are constitutionally mandated in the civil commitment process, the Court has recognized in a series of decisions that the civil

commitment of an individual involves a serious deprivation of liberty.

In the most recent decision involving an involuntarily committed mental patient, the Court narrowed the issue to an "important question concerning every man's constitutional right to liberty." *O'Connor* v. *Donaldson,* 422 U.S. 563, 573 (1975). The Court held that

> a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.

Id. at 576. In his concurring opinion, Chief Justice Burger emphasized the overriding interest in liberty held by a mentally ill individual who is nondangerous and capable of surviving safely in freedom. *Id.* at 578 (Burger C.J., concurring).[2]

"Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power [to involuntarily hospitalize] have

---

[2] "There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law." 422 U.S. at 580 (Burger C.J., concurring). *See also* Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives,* 70 Mich. L. Rev. 1107, 1158 (1972). "It is indeed hard to accept that there can be any 'fundamental personal liberty' . . . more fundamental than personal liberty itself and personal liberty is, of course, what is at risk in its most literal sense for the mentally ill." Among the fundamental interests which Chambers argues are affected by civil commitment are the rights to travel, of free association, to peaceably assemble, to communicate and receive communications, to exercise religious beliefs and to maintain one's privacy, though overriding is the right not to be physically confined.

not been more frequently litigated." *Jackson* v. *Indiana,* 406 U.S. 715, 737 (1972). In the case at Bar, the Court is asked to decide whether the state must provide minors with certain procedural safeguards in order to justify "a massive curtailment of liberty."[3] *Humphrey* v. *Cady,* 405 U.S. 504, 509 (1972).

At stake is an individual's liberty, "an interest of transcending value." *Speiser* v. *Randall,* 357 U.S. 513, 525 (1958). *Amici* argue that the preservation of that liberty interest requires that due process protections attach.[4] To

---

[3] It is of no importance that the procedure is labeled "voluntary" rather than "involuntary." Semantic usage cannot mask the reality that the minor is not giving his or her consent to the liberty deprivation. The question of whether to apply due process can only be answered by an inquiry into the substance of the deprivation. *Cf. In re Gault,* 387 U.S. 1 (1967). The reality is that a minor is deprived of the fundamental right to liberty and involuntarily placed in an institutional environment through the actions of a parent or guardian with the concurrence of the state and under the legal auspices of the state. As several courts have noted, confinement of an individual to an institution without his or her consent and without presenting realistic alternatives to the individual constitutes involuntary confinement. *Halderman* v. *Pennhurst State School and Hospital,* 446 F. Supp. 1295, 1311 (E.D. Pa. 1977); *Griswold* v. *Riley,* No. CIV 77-144 PHX-CAM (D. Ariz. July 15, 1977); *New York State Association for Retarded Children* v. *Rockefeller,* 357 F. Supp. 752, 762 (E.D.N.Y. 1973); *Horacek* v. *Exon,* 357 F. Supp. 71, 74 (D. Neb. 1973).

[4] The Court of Appeals for the District of Columbia, having scrutinized the civil commitment process, concluded:

> There can no longer be any doubt that the nature of the interests involved when a person sought to be involuntarily committed faces an indeterminate and, consequently, potentially permanent loss of liberty and privacy accompanied by the loss of substantial civil rights (the loss of which frequently continues even if his liberty is restored) is "one within the contemplation of the 'liberty and property' language of the Fourteenth Amendment."

In re Bailay, 482 F.2d 648, 655 (D.C. Cir. 1973), citing *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972).

permit the state-sponsored deprivation of an individual's liberty upon the consent of another person, without providing the individual who is subject to the civil commitment an opportunity for a hearing, does not afford sufficient due process.

2. The Liberty Interest Affected by Civil Commitment Is as Substantial as the Liberty Interest Infringed Upon in Other "Civil" Proceedings Involving Minors. The juvenile justice system historically provided only informal standards and procedures, based upon the rationale that the proceedings were civil in nature and based upon an assumed benevolent intent to rehabilitate wayward youth. In numerous respects, the former policies of administration of juvenile justice parallel the current civil commitment practices in many states.

In 1967, the Court looked beyond the asserted reasoning to analyze the effect of the juvenile process upon the individual.

> Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours. . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.

In re Gault, 387 U.S. 1, 27 (1967) (footnotes omitted).

Rather than relying upon the labels attached to the procedures, the Court struck to the heart of the matter: commitment means depriving a person of his or her liberty. The Court applied the basic principles of due process to juvenile proceedings, reasoning that

> [t]o hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings . . . . For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil."

Id. at 49-50.

Three years later, the Court reiterated its decision in *Gault* and extended its reasoning to require a reasonable doubt standard of proof in juvenile proceedings. *In re Winship*, 397 U.S. 358 (1970). The Court emphasized that the "'civil' label-of-convenience" and the desire "not to punish, but to save the child" had been rejected as a basis for not applying due process.

> We made clear in that decision that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."

Id. at 365-66, quoting *In re Gault*, 387 U.S. 1, 36 (1967).

In his concurring opinion in *Winship*, Justice Harlan made it clear that the Court's decision turned upon the consequences of the proceeding to the juvenile.

> First, and of paramount importance, a factual error here, as in a criminal case, exposes the accused to a complete loss of his personal liberty through a state-imposed confinement away from his home, family, and friends. And, second, a deliquency determination, to some extent at least, stigmatizes a youth in that it is

> by definition bottomed on a finding that the accused committed a crime. Although there are no doubt costs to society (and possibly even to the youth himself) in letting a guilty youth go free, I think here, as in a criminal case, it is far worse to declare an innocent youth a delinquent.

Id. at 374 (Harlan J., concurring).

The focal point of the Court's analysis in *Gault* and *Winship* was clearly upon the restrictions which the legal process placed upon the individual's liberty.[5] *Amici* argue that a similar approach to assessing the effects of the civil commitment process upon juveniles supports the conclusion that the individual's liberty interest is infringed upon. *Amici* assert that the liberty interest at stake in the case at Bar is similar to, and as important as, the liberty interest affected by the juvenile justice system. Therefore, the state's power to interfere with that liberty interest is subject to the restrictions of the due process clause.[6]

[5] Similarly, in *Breed* v. *Jones,* 421 U.S. 519 (1975), the Court followed the holdings in *Gault* and *Winship* to apply the double jeopardy clause to juveniles subject to transfer from juvenile court to adult court.

[6] The striking similarity between the liberty interests in juvenile proceedings and those in the civil commitment process formed the basis for the holding of the United States Court of Appeals for the Tenth Circuit that a nine year old child committed to a training school for "feeble-minded and epileptic children" had a right to counsel.

> [T]he liberty of an individual is at stake, and we think the reasoning in Gault emphatically applies. It matters not whether the proceedings be labeled "civil" or "criminal" or whether the subject matter be mental instability or juvenile delinquency. It is the likelihood of involuntary incarceration—whether for punishment as an adult for a crime, rehabiiitation as a juvenile for delinquency, or treatment and training as a feeble-minded or mental incompetent—which commands observance of the constitutional safeguards of due process.

Heryford v. *Parker,* 396 F.2d 393, 396 (10th Cir. 1968).

B. The Right To Be Heard Is an Integral Component of Due Process Which Has Been Consistently Required by the Court Prior to the Deprivation of Liberty and/or Property Interests.

In imposing constitutional restraints upon the state's infringement of liberty interests through civil juvenile proceedings, the Court mandated that a hearing be provided to satisfy the requirements of due process.[7] *In re Gault,* 387 U.S. 1 (1967). Similarly, in decisions involving the civil commitment process, the Court has recognized the inherent importance of a hearing. In *Baxstrom* v. *Herold,* 383 U.S. 107 (1966), the Court held that individuals who were committed at the expiration of their penal sentences were denied equal protection when they were not provided with a jury review or a judicial determination of dangerousness, both of which were afforded to other persons in the civil commitment process. The Court rejected the state's contention that groups of persons could be differentiated and that one group could be denied a hearing solely on the basis that its members were nearing the end of their prison terms.

Likewise, in *Jackson* v. *Indiana,* 406 U.S. 715 (1972), the Court held that a person found incompetent to stand trial could not be held more than a reasonable period of time to determine future capacity to stand trial, unless the individual was civilly committed pursuant to a state law which provided for a hearing.

> If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that gen-

[7] The Court held that the hearing must include the following procedural safeguards: notice of the charges; right to counsel; right to confrontation and cross-examination of witnesses; and, the privilege against self-incrimination. The Court later added the requirement that the proof satisfy a reasonable doubt standard. *In re Winship,* 397 U.S. 358 (1970).

erally available to all others, the mere filing of criminal charges surely cannot suffice.

Id. at 724.

The Court's refusal to condone liberty deprivations without a hearing, based upon a previous criminal conviction and penal sentence or based upon the filing of a criminal charge, is a recognition of the importance of the individual's interest. Similarly, *amici* submit that the status of minority cannot be a sufficient justification for denying a hearing which is otherwise provided to adults.[8] A hearing, aimed at determining the factual basis for the deprivation of liberty, is just as essential for a minor as for an adult in the civil commitment process.[9]

---

[8] *Cf. Baxstrom* v. *Herold,* 383 U.S. 107, 115 (1966). The capriciousness of the classification employed by the State is thrown sharply into focus by the fact that the full benefit of a judicial hearing to determine dangerous tendencies is withheld only in the case of civil commitment of one awaiting expiration of penal sentence." This does not mean that in all situations a rational distinction cannot be drawn. The Court need not decide and *amici* do not address the question of proper procedures to be followed in the state's provision of respite care. This should initially be left to the discretion of the state, subject to judicial review should the necessity arise.

[9] In *Jackson* v. *Indiana,* 406 U.S. 715 (1972), the Court indicated that Jackson was not afforded formal commitment proceedings aimed at discovering the factual basis for the liberty deprivation. "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* at 738. Due process must attach regardless of the age of the individual who is subject to commitment. The minor's liberty interest parallels closely the liberty interest of an adult facing involuntary commitment. The physical restraint, stigma and other deprivations entailed in institutionalization are the same as those encountered by adults. As the Court recognized in *Gault, supra,* the incarceration of juveniles requires due process protections which are similar to those provided to similarly situated adults—despite legislative nomenclature (i.e., "civil"/"criminal" or "minor voluntary"/"involuntary").

Moreover, the Court has previously required the provision of a hearing in matters involving interests less fundamental than the liberty interests implicated by civil commitment. In *Morissey* v. *Brewer,* 408 U.S. 471 (1972), the Court considered the question of whether a convicted criminal on parole status had the right to a hearing prior to the revocation of parole. The Court held that revocation of parole abridged a liberty interest contemplated by the due process clause of the fourteenth amendment, albeit only a conditional liberty interest, and that a hearing prior to revocation was constitutionally required. Protections for conditional liberty were later further extended when the Court required a hearing prior to the revocation of probation.[10] *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973).

The Court has not limited the due process protection of liberty "to mere freedom from bodily restraint," *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954), but has extended the requirement of a hearing to liberty interests involving one's good name, reputation, honor or integrity. In *Goss* v. *Lopez,* 419 U.S. 565 (1975), the nature of a student's liberty interest in his or her reputation and standing with fellow pupils and teachers required a hearing prior to the student's suspension from a public high school for misconduct, even though the suspension was limited to ten

---

[10] *See also* Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267 (1975), commenting upon *Morrissey* and *Gagnon.*

> Deprivation of liberty, even conditional liberty, is the harshest action the state can take against the individual through the administrative process. The Supreme Court thus was right in demanding a very high level of procedural protection and in setting out the required procedures in detail. Civil commitment warrants a similarly high place.

Id. at 1296.

days. Also involved was the student's property interest in educational benefits which required due process protection.

Similarly, in employment cases, the Court has viewed the combined liberty interest involving reputation and stigma with a property interest to require the provision of prior hearings. The Court in *Perry* v. *Sindermann*, 408 U.S. 593 (1972), and *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), held that a public educational institution may not dismiss a teacher without a hearing when the teacher is tenured or when the dismissal involves a stigma which can impair the ability to obtain future employment.

Triggering this broad application of due process was the Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). There, the Court made clear that an evidentiary hearing prior to the termination of welfare benefits was constitutionally required to protect a fourteenth amendment property interest.

The Court later extended this protection of property interests to: the revocation of a driver's license, *Bell* v. *Burson*, 402 U.S. 535 (1971); the repossession of a chattel through replevin, *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); and, the loss of a prisoner's good-time credits, *Wolff* v. *McDonnell*, 418 U.S. 539 (1974).

In several instances in which the Court has failed to apply due process to require a hearing, the Court has stressed the availability of elaborate administrative procedures or the possibility of regaining the otherwise protected interests retroactively if the individual was successful on the merits of the claim. In *Arnette* v. *Kennedy*, 416 U.S. 134 (1974), a nonprobationary federal employee could be discharged for cause without a prior hearing where the employee was entitled to a subsequent evidentiary hearing which would result in reinstatement and backpay if the employee prevailed. In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the Court held that an evidentiary hearing was not required prior to the termination of social security disability payments, because elaborate administrative procedures were provided which assured the right to an evidentiary hearing and to judicial review subsequent to the termination of disability benefits.

Amici argue that the right of a minor to be free from bodily restraint, to protect his or her reputation, and to guard against the adverse stigma of commitment are substantial liberty interests which can only be protected by the requirement of a hearing in civil commitments. Where due process requires such a result when liberty and property interests are at stake in parole and probation revocations, public school suspensions, public employment, welfare benefits, drivers' licenses, replevin actions and good-time credits, similar procedural protections must attach to the liberty interest abridged by civil commitment. *Amici* submit that the liberty interest of a minor committed to an institution is more significant than many of the interests which the Court has previously protected by requiring prior hearings.

Additionally, the civil commitment process provides no method for the restoration of the liberty interests which are abridged. Hearings must, therefore, be required in order to adequately protect the individual's fundamental interests.

II.

THE PROVISION OF A HEARING IS MANDATED BY BALANCING THE MINOR'S INTERESTS AND THE RISK OF AN ERRONEOUS DEPRIVATION OF LIBERTY AGAINST THE GOVERNMENTAL INTEREST IN CIVILLY COMMITTING THE MINOR TO AN INSTITUTION.

A. Commitment of a Minor to an Institution Deprives the Individual of the Fundamental Right to Freedom, Adversely Stigmatizes Him or Her for Life, and Abridges Numerous Other Constitutionally Protected Rights.

The nature and extent of due process protections which should attach to the process of committing a minor reflect in part the nature and extent of the infringement upon liberty which results. The expansive deprivations which occur in the commitment of minors have been vividly delineated by the three-judge federal court in *J. L. and J. R.* v. *Parham*, 412 F. Supp. 112 (M.D. Ga. 1976), *prob. juris. noted*, 431 U.S. 936 (1977), *reargument ordered*, ... U.S. ....., 98 S. Ct. 761 (1978).

> [T]his case raises the most important question of every child's constitutional right to liberty, not only the liberty that includes freedom from bodily restraint, *Meyer* v. *Nebraska*, 262 U.S. 390 (1922), but also the liberty that includes the freedom of an ordinary, everyday child in these United States of America—the freedom to live with mothers, fathers, brothers and sisters in whatever the family abode may be; the freedom to be loved and to be spanked; the freedom to go in and out the door, to run and play, to laugh and cry, to fight and

> fuss, to stand up and fall down, to play childish games; the freedom to go to school and to frolic with school mates; the freedom to go to Sunday School and church; the freedom to watch and listen or not to watch and listen to television; the freedom to buy candy at the corner store; the freedom to be a normal child in a normal household cared for by normal parents.

Id. at 136. Thus the rights affected by the commitment process include the right to be free from restraint in its most basic form, as well as numerous first amendment rights.[11] Restrictions on freedom of movement, loss of privacy and denial of many basic civil rights are commonplace.[12]

Beyond the most apparent deprivations of liberty interests are the collateral aspects of institutionalization—the stigma of mental disability and the discrimination which result from being a former "inmate." These deprivations are not de minimis. The judiciary has acknowledged the stigma associated with intitutionalization,[13] as have a num-

---

[11] The Court has previously extended first amendment protections to juveniles. *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969).

[12] For a detailed discussion of these numerous deprivations, see Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1193-1200 (1974).

[13] *See e.g. In re Ballay*, 482 F.2d 648, 668-69 (D.C. Cir. 1973); *Lessard* v. *Schmidt*, 349 F. Supp. 1078, 1089 (E.D. Wis. 1972), *remanded*, 414 U.S. 473 (1974), *reinstated*, 379 F. Supp. 1376 (E.D. Wis. 1974), *remanded*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976). *Cf. In Re Winship*, 397 U.S. 358 (1970), recognizing the stigma attached to a finding of juvenile delinquency.

ber of commentators.[14] Prior institutionalization can adversely affect one's search for employment[15] and one's

[14] *See e.g.* Goffman, Asylums 355-56 (1961), discussing stigma from external sources as well as a form of internal stigma which creates an alienation from society. *See also* Teitelbaum and Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application* 30-32 (to be published in 12 Fam. L.Q. 153, prepublication manuscript on file in the Library of the Supreme Court); *Developments in the Law, supra* note 12.

> Along with these official deprivations, a former mental patient may suffer from the social opprobrium which attaches to treatment for mental illness and which may have more severe consequences than do the formally imposed disabilities.

Id. at 1200.

The mere fact of discharge may not alter society's perception of mentally disabled individuals; once diagnosed, an individual does not easily shed the label given. *See e.g.* Rosenhan, *On Being Sane In Insane Places,* 13 Santa Clara Lawyer 379 (1973), where pseudopatients, after obtaining their release from a mental institution, were not described as having recovered or having never been schizophrenic, but were all released with the psychiatric notation "schizophrenia, in remission." *See also In re Ballay,* 482 F.2d 648, 668-69 (D.C. Cir. 1973).

[15] "One commentator, noting that 'former mental patients do not get jobs,' has insisted that '[i]n the job market, it is better to be an ex-felon than ex-patient.'" *Lessard* v. *Schmidt,* 349 F. Supp. 1078, 1089 (E.D. Wis. 1972), *remanded,* 414 U.S. 473 (1974), *reinstated,* 379 F. Supp. 1376 (E.D. Wis. 1974), *remanded,* 421 U.S. 957 (1975), *reinstated,* 413 F. Supp. 1318 (E.D. Wis. 1976), quoting Testimony of Bruce Ennis, Hearings Before the Senate Subcommittee on Constitutional Rights, 91st Congress, 2d Sess. at 284 (1970). The federal government, by enacting the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., has attempted to combat discrimination, including employment discrimination, against individuals labeled mentally disabled. *See also Doe* v. *Hampton,* No. 76-1090 (D.C. Cir. Sept. 14, 1977); *Spencer* v. *Toussaint,* 12 E.P.D. ¶ 11,112 (E.D. Mich. 1976).

educational pursuits.[16]

The curtailment of liberty which results from civil commitment can, in some instances, result in greater deprivation for minors than for adults.[17] The effect of civil commitment upon children may be magnified, because it is in their childhood years that they are most dependent upon familial relationships and support; hence, they are extremely vulnerable to the harms of institutionalization.[18] Separation from parents at an early age can adversely affect critical areas of development.[19] Even a short com-

[16] *See e.g. Doe* v. *New York University,* 442 F. Supp. 522 (S.D. N.Y. 1978). Recent federal legislation is aimed at combatting discrimination in education. The Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq.; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

[17] Even if the child's interests did not reach the level of an adult's interests, the burden upon the state to justify its differentiation in procedural protections would be great. "So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive that cliché can provide." *In re Gault,* 387 U.S. 1, 29-30 (1967).

[18] The loss of developmental skills is perhaps the greatest harm. Teitelbaum and Ellis, *supra* note 14, at 32, citing voluminous scientific literature on the adverse effects of institutionalization upon intelligence quotient, verbal and motor skills, and social competence. As one commentator notes: "The stakes are high: a child's life may be ruined by hasty, ill-informed procedures." Holladay, *Due Process Limitations on Parental Rights to Commit Children to Mental Institutions,* 48 U. Colo. L. Rev. 235, 266 (1977).

[19] Scheerenberger, Deinstitutionalization and Institutional Reform 20 (1976).

> The single most powerful factor in the personality development of the child is the happiness and stability of the home in which he spends his early years. We do not mean by such a home that it need be characterized by a high level of education, a high

(footnote continued)

mitment may be traumatic for the child; depending on the child's developmental stage, a few days of separation from one's parents can lead to despair and profound feelings of helplessness and deprivation.[20] In addition, commitment will invariably disrupt the child's formal education in an adverse manner.[21]

Clearly, civil commitment involves infringements of liberty beyond basic physical restraint.

> [C]onsiderable harms . . . may befall the individual because of involuntary confinement. These may include stigmatization; collapse of self-esteem, separation from family and community . . . and impairment of future employment prospects, as well as, in our current state of institutional care, a not insubstantial chance of brutalization or mere physical deterioration in the total institutions to which many such persons are sent.[22]

(footnote continued)

> standard of living, or even a high degree of success in meeting its problems, important and desirable as these may be. We mean a happy and stable home, one in which there is affection and consideration among the members for each other; one in which the individual members are emotionally secure and in mental health (Dewey and Humber, 1951).

Id. at 19.

[20] Goldstein, Freud and Solnit, Beyond the Best Interests of the Child 40-42 (1973). "A child will experience a given time period not according to its actual duration, measured objectively by calendar and clock, but according to his purely subjective feelings of impatience and frustration." *Id.* at 41.

[21] Under the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq., each handicapped child must have a carefully planned and detailed individualized education plan.

[22] Stone, Mental Health and Law: A System in Transition 48-49 (1975) (published by The National Institute of Mental Health).

Amici assert that the individual's liberty interests in civil commitment are both substantial and diverse. Adequate protection for those interests cannot exist absent procedural due process rights which include the right to a hearing.

B. The Provision of Hearings Will Minimize the Risk of Erroneous Commitments of Minors to Institutions.

The right to a hearing holds a special position within the protections granted by the due process clause.

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Mullane v. *Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). The value of a hearing cannot be seriously questioned where substantial individual interests are at stake.

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter J., concurring). The Court has unequivocally stated that "[w]hen protected interests are implicated, the right to some kind of prior hearing is paramount." *Board of Regents* v. *Roth*, 408 U.S. 564, 569-70 (1972).

The decision to commit a minor is based upon unique and difficult considerations; the questions raised and the issues to be resolved are complex. Thus, the resultant risk

of erroneously committing a minor to an institution is very high. *Amici* submit that the due process clause envisions the provision of hearings to resolve issues such as those addressed in the civil commitment process.

1. Psychiatry and Psychology Are Inexact Sciences. The threshold question prior to a civil commitment is whether the minor is mentally ill or mentally retarded. *Amici* argue that this inquiry is not easily resolved and that the "experts" relied upon are often in disagreement.

If an application is filed to commit a mentally ill child based upon his or her parent(s)' perception of the minor's actions or behavior, a psychiatrist must diagnose that child to determine the basis for state intervention. To justify commitment, a specific mental illness must be found by competent medical examinations.

However, as Chief Justice Burger astutely recognized over a decade ago, psychiatrists and psychologists "may be claiming too much in relation to what they really understand about the human personality and human behavior."[23] Exclusive reliance upon their opinions in a decision to commit may lead to a high degree of erroneous commitment.

A recent article which reviewed the available literature on the question of psychiatric reliability[24] concluded:

---

[23] Burger, *Psychiatrists, Lawyers, and the Courts*, 28 Fed. Prob. 37 (1964).

[24] The concept of reliability is measured by the "probability or frequency of agreement when two or more independent observers answer the same question." Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Calif. L. Rev. 693, 697 (1974). The reliability of the diagnosis thus defines the degree of consistency among opinions of psychiatrists concerning a person's condition.

"Studies on psychiatric diagnosis highlight psychiatry's lack of precise definitions and the inability of psychiatrists to apply these definitions in a reliable and consistent manner."[25] Similarly, another reviewer of the relevant literature observed: "With regard to reliability of diagnosis, the most common research findings indicate that, on the average, one cannot expect to find agreement in more than about 60% of cases between two psychiatrists."[26]

The diagnosis of an allegedly mentally retarded child raises similar questions of accuracy. Again, a threshold finding of mental retardation is required to invoke the commitment power; without such a finding, no justification for institutionalization can arise. As with allegedly mentally ill children, many children who are labeled mentally retarded may not be mentally retarded, because testing is not always accurate and because that which is tested for may not accurately describe the child's true functioning ability.

---

[25] Albers, Pasewark & Meyer, *Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of the Doctrine of Immaculate Perception*, 6 Cap. U.L. Rev. 11, 15 (1976), and studies cited therein.

[26] Ziskin, Coping With Psychiatric and Psychological Testimony 181 (2nd ed. 1975), and studies cited therein. *See also* Beck, Ward, Mendelson, Mock & Erbaugh, *Reliability of Psychiatric Diagnosis: A Study of Consistency of Clinical Judgments and Ratings*, 119 Am. J. Psychiat. 351 (1962), cited in Ziskin, *supra*, at 183. "Under relatively optimal conditions, the percentage of agreement among psychiatrists was found to be 54%."

Similarly, the validity, or accuracy, of the psychiatric judgment must be questioned because, when disagreement occurs between two psychiatrists, either one or both must be in error. Therefore, when reliability does not exceed 60 percent, the accuracy of diagnosis cannot exceed 60 percent, and it is probably significantly lower. For a landmark study on the inability of psychiatrists to accurately determine the threshold condition of mental illness, see Rosenhan, *supra* note 14, at 379.

Of all individuals labeled as mentally retarded, the overwhelming majority, approximately 89 percent, fall within the category of mild retardation.[27] Yet "[i]t is also in the mildly retarded range that one finds the largest number of individuals for whom the diagnosis of mental retardation is uncertain."[28] This results from a lack of precision in testing, as well as a cultural bias which exists in the testing.

> A child with an IQ score within the mild range of mental retardation who is from a low-socioeconomic-status group is more likely to be diagnosed mentally retarded than a middle- or upper-class child with a similar score.[29]

Once placed upon a child, the label of mental retardation is usually geared towards his or her potential classroom performance. Yet, the use of the label for that purpose

---

[27] National Association for Retarded Citizens, Facts on Mental Retardation 15 (1973).

[28] Hobbs, The Future of Children 52 (1975).

[29] *Id.* at 29-30. In 1968 the President's Committee on Mental Retardation reported that a child in a low income rural or urban family was fifteen times more likely to be diagnosed as mentally retarded than a child from a higher income family. Scheerenberger, *supra* note 19, at 15. *See also Larry P.* v. *Riles,* 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd,* 502 F.2d 963 (9th Cir. 1974); *Diana* v. *California State Board of Education,* C.A. No. C-70 37 RFD (N.D. Cal. 1970), both concerning culturally biased IQ testing.

> Perhaps there is no other place in the health system where labels are more odious and more invidious. . . . These labels are, of course, applied to a disproportionate number of disadvantaged and minority children. This clinical result is accomplished despite the fact that the tests measure achievement rather than ability and despite the fact that most of those in common use are culture bound instruments.

Stone, *supra* note 22, at 52. *See also* Deutsch, Katz and Jensen, Social Class, Race and Psychological Development 33 n.6 (1968).

may be irrelevant to the individual's ability to function outside the classroom or to his or her need for institutionalization.[30] Frequently, by the time the child completes the process of formal education and becomes integrated into adult working society, he or she is no longer recognized as mentally retarded.[31] Thus, the threshold determination of mental retardation may be extremely misleading in the context of assessing the child's ability to function in the home and in the community.[32]

Amici believe that a hearing is necessary to minimize the risk of error in the commitment of minors to institutions. Such a forum for considering the testimony of various experts, all of whom would be subject to questioning designed to test the accuracy of their findings and recommendations, would guard against wrongful deprivations of liberty.

---

[30] *See* Telford and Sawrey, The Exceptional Individual 159 (1967). "Follow-up studies of mildly mentally retarded children show that test scores, by themselves, are poor prognosticators of adult occupational and social adjustment." *See also* Allen, Legal Rights of the Disabled and Disadvantaged 13 (1969). "Unfortunately, legal status is too often determined on the basis of a single I.Q. score despite the reservations expressed by all who participate in the classification process." *See generally* Linn and Bowers, *Analysing the Legal Prohibitions Against Marriages Involving Mentally Retarded Persons—The Eternal Child Grows Up.* 13 Gonz. L. Rev. 625, 652-55 (1978), discussing the complications of the concept of mental retardation and the limitations on the use of I.Q. scores.

[31] *See e.g.,* Mercer, *The Myth of 3% Prevalence* in Sociobehavioral Studies in Mental Retardation 11 (Tarjan, Eyman & Meyers, eds. 1973). *See also* Kay, Farnham, Karren, Knakal and Diamond, *Legal Planning for the Mentally Retarded: The California Experience,* 60 Cal. L. Rev. 438, 441-42 (1972).

[32] Hobbs, *supra* note 29, at 30 and 52. *See also* President's Committee on Mental Retardation, The Six Hour Retarded Child (1976).

2. The Decision to Commit Is Based Upon an Analysis of Factual Information, and Exclusive Reliance Upon Expert Determinations Is Improper. Even if experts in psychiatry and psychology could diagnose mental disability with more accuracy, the need for a hearing would continue to exist. The decision to institutionalize a child is one of much gravity which requires factual findings beyond the threshold establishment of the existence of mental disability.[33] The rationale for civil commitment must also rest upon behavior of the child which evidences a need for treatment or habilitation in an institutional setting. It is the need to test the accuracy of the facts upon which civil commitment is recommended that demands the provision of a hearing; no other procedural mechanism can adequately serve this fact-finding purpose.

In *Goss* v. *Lopez,* 419 U.S. 565 (1975), the Court scrutinized the nature of the inquiries which must be made to accurately determine the facts concerning the behavior of a student. In reviewing the process by which a student could be suspended for disciplinary reasons for a period up to ten days, the Court correctly observed that

> the concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against . . . .

Id. at 579-80.

[33] *Cf. O'Connor* v. *Donaldson,* 422 U.S. 563 (1975).

The Court went on to hold that due process requires notice and, for short suspensions not exceeding ten days, an informal hearing. This hearing provides the student with the opportunity to learn of the adverse action being proposed by the school officials and of the reasons why it is being proposed. This hearing also affords the student the opportunity to respond to and attempt to rebut the factual allegations made by school officials.[34]

In *Goss,* the Court also noted that school suspensions for more than ten days or expulsions "may require more formal procedures." *Id.* at 584. *Amici* submit that the Court's recognition of the need for an informal hearing in *Goss,* and the Court's suggestion of the possibility of more formal hearing procedures being required where the educational deprivation is greater, set the framework for this Court's determination in the case at Bar. In the commitment process, where numerous constitutionally protected interests are implicated, due process requires some form of hearing in order to insure the fairness of the fact-finding function.

Justice Powell, in his dissenting opinion in *Goss,* was concerned about the implications of requiring due process protections in "routine school decisions" about student suspensions, which he viewed as similar to numerous decisions left to the expertise of teachers, such as academic evaluations. However, in *Board of Curators of University of Missouri* v. *Horowitz,* ..... U.S. ....., 98 S. Ct. 948 (1978),

[34] The child who is subject to civil commitment frequently experiences a substantial disruption of his or her educational process as a result of institutionalization. *Amici* argue that, as a result of commitment, minors can experience a deprivation of public education benefits that is greater than a ten day suspension, and that a more formalized hearing than that ordered in *Goss* is constitutionally required.

the Court upheld the dismissal of a student from medical school, clarifying the distinction between a student's failure to meet academic standards and a student's violation of rules of conduct. In *Horowitz*, the decision to dismiss the student was based upon "the academic judgment of school officials"—which properly included subjective considerations and evaluative determinations. However, the informal hearing required in *Goss* resulted from the need for an objective determination of the actual conduct of an individual.

Amici argue that a minor's due process right to a hearing in the civil commitment process should be considered in the context of *Goss* and *Horowitz*. Civil commitment results from behavior which must be factually determined, such as behavior which illustrates an inability to function in the community or dangerous acts. While a student can fail a course of study based upon an academic assessment which is not subject to the due process requirement of a hearing, a child cannot be committed merely because a parent or physician diagnoses mental illness or mental retardation. Rather, the label of mental deficiency must be linked to conduct which can be factually proven and which justifies placing the child in an institution.

If the hearings ordered by the lower court in the case at Bar are not approved by this Court, an unacceptable dichotomy will result. A child who exhibits acts or deficiencies of behavior, but who is not mentally disabled, cannot be institutionalized unless such behavior can be controlled through the state's juvenile justice system. In that event, the youth is afforded full due process protections. *In re Gault, supra. See also In re Winship, supra.*

Amici also argue that a child who has been diagnosed as mentally retarded or mentally ill, but who does not ex-

hibit such behavior, cannot be institutionalized upon a mere showing of mental deficiency.[35] Only when mental deficiency exists concurrently with facts concerning the individuals conduct which support a need for institutionalization can commitment occur. These facts are frequently in dispute, and the evidence is often unreliable. Therefore *amici* submit that due process requires a hearing in order to protect against the risk of improper commitment.

---

[35] *Cf. O'Connor* v. *Donaldson*, 422 U.S. 563 (1975); *Jackson* v. *Indiana*, 406 U.S. 715 (1972). A factual determination is necessary regardless of whether a parens patriae or a police power rationale is utilized to justify civil commitments. Under the parens patriae doctrine, the commitment standard is often phrased in terms of the "need for care and treatment." This standard demands factual findings concerning the individual's behavior—i.e., suicide attempts, self-injurious behavior, inability to perform the basic tasks of life. The statistical showing that no more than three percent of the total population of mentally retarded persons in the United States has ever been institutionalized illustrates the importance of reviewing an individual's behavior. Scheerenberger, *supra* note 29, at 17.

Additionally, the numerous courts which have rejected the parens patriae rationale have required a factual finding in commitments brought pursuant to the police power—i.e., dangerous behavior based upon overt acts. *E.g. Suzuki* v. *Alba*, 438 F. Supp. 1106 (D. Haw. 1977); *Goldy* v. *Beal*, 429 F. Supp. 640 (M.D. Pa. 1976); *Stamus* v. *Leonhardt*, 414 F. Supp. 439 (S.D. Ia. 1976); *Doremus* v. *Farrell*, 407 F. Supp. 509 (D. Neb. 1975); *Lynch* v. *Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974); *Bell* v. *Wayne County Hospital*, 384 F. Supp. 1085 (E.D. Mich. 1974); *Lessard* v. *Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded*, 414 U.S. 473 (1974), *reinstated*, 379 F. Supp. 1376 (E.D. Wis. 1974), *remanded*, 421 U.S. 957 (1975), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976). *See also Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270 (1940).

3. Hearings Can Overcome the Exclusive Reliance Upon Institutional Solutions in Commitment Proceedings By Causing an Exploration of Less Restrictive Alternatives Which May Be More Appropriate to the Needs of a Mentally Disabled Child. In many instances parents and even physicians whom they consult have no knowledge of alternatives for residential placement other than the home or an institution. Even the most concerned and well-intentioned parent(s), who feel their child needs services, may be aware of only the highly visible and well-publicized institution which serves their community.

Numerous courts have held that due process requires the application of the least restrictive alternative principle to persons confined in[36] or facing commitment to[37] facilities for the mentally disabled. The constitutional basis for the least restrictive alternative is not at issue here and need

[36] *E.g., Halderman* v. *Pennhurst State School and Hospital,* 446 F. Supp. 1295 (E.D. Pa. 1977); *J.L. and J.R.* v. *Parham,* 412 F. Supp. 112 (M.D. Ga. 1976), *prob. juris. noted,* 431 U.S. 936 (1977), *reargument ordered,* ..... U.S. ....., 98 S. Ct. 761 (1978); *Dixon* v. *Weinberger,* 405 F. Supp. 974 (D.D.C. 1975); *Welsch* v. *Likins,* 373 F. Supp. 487 (D. Minn. 1974), *aff'd in part, remanded in part,* 550 F.2d 1122 (8th Cir. 1977); *New York State Association for Retarded Children* v. *Rockefeller (Carey),* 357 F. Supp. 752 (E.D.N.Y. 1973) and 393 F. Supp. 715 (E.D.N.Y. 1975); *Wyatt* v. *Stickney,* 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom., Wyatt* v. *Aderholt,* 503 F.2d 1305 (5th Cir. 1974).

[37] *E.g., Stamus* v. *Leonhardt,* 414 F. Supp. 439 (S.D. Ia. 1976); *Suzuki* v. *Quisenberry,* 411 F. Supp. 1113 (D. Haw. 1976); *Lynch* v. *Baxley,* 386 F. Supp. 378 (M.D. Ala. 1974); *Lessard* v. *Schmidt,* 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded,* 414 U.S. 473 (1974), *reinstated,* 379 F. Supp. 1376 (E.D. Wis. 1974), *remanded,* 421 U.S. 957 (1975), *reinstated,* 413 F. Supp. 1318 (E.D. Wis. 1976); *Dixon* v. *Attorney General of Commonwealth of Pa.,* 325 F. Supp. 966 (M.D. Pa. 1971). *See also O'Connor* v. *Donaldson,* 422 U.S. 563, 575 (1975), citing favorably *Shelton* v. *Tucker,* 364 U.S. 479 (1960).

not be decided by the Court. However, the focus of the doctrine, whether constitutionally required or not, serves to illustrate that, unless the available alternatives are explored, a minor may be improperly placed in an institution when more appropriate and more beneficial services are available in the community but have been overlooked.[38]

In recent years, the federal government has also pursued the goal of providing services to mentally disabled persons in community settings whenever possible, rather than relying upon institutional care.[39] As a result, community

[38] *See generally* Soskin, *The Least Restrictive Alternative: In Principle and in Application,* Amicus, Vol. 2, No. 6, at 28 (Nov. 1977); Chambers, *supra* note 2.

[39] The federal policy favoring deinstitutionalization can be traced to the Mental Health Study Act of 1955, ch. 417, § 3, 69 Stat. 382, which resulted in a Report of the Joint Commission on Mental Illness and Health entitled "Action for Mental Health," which was submitted to Congress in 1960. Following a one year study, a report of the President's Panel on Mental Retardation entitled "A Proposed Program for National Action to Combat Mental Retardation" was submitted to President Kennedy in 1962. The President then prepared the first special message to Congress on mental illness and mental retardation in 1963, focusing his concerns upon the need for augmenting community services and reducing the population of mental hospitals. Similarly, President Nixon issued a statement in 1971 establishing a national goal of returning a substantial number of mentally retarded persons to the community.

For a discussion of these developments and the numerous federal policies and programs aimed at deinstitutionalization, see Comptroller General of the United States, Report to the Congress—Returning the Mentally Disabled to the Community: Government Needs to Do More (1977). Federal acts and programs designed to implement the deinstitutionalization goal include: the Community Mental Health Centers Construction Act of 1963 and the Community Mental Health Centers Amendments of 1975, 42 U.S.C. § 2689; the Special

(footnote continued)

residences and support services have proliferated.[40] Community-based services have also been determined to be generally the most appropriate approach to the care and treatment of mentally disabled persons by the state.[41]

The formal structure under which the alternatives to commitment are explored can vary in its approach; the underlying importance of the hearing, in its several possible forms, is that the best interests of the child are explored by the inquiry into alternatives. One model would require the state to explore all available alternatives prior to institutional commitment and to present its findings during

(footnote continued)
Health Revenue Sharing Act of 1975, 42 U.S.C. § 246; the Housing and Community Development Act of 1974, 42 U.S.C. § 1437(2); Title XX of the Social Security Act, 42 U.S.C. § 1397; the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010; and, the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq.

[40] *See generally* Comptroller General Report, *supra* note 39; Menolascino, Challenges in Mental Retardation (1977); President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded (Kugel and Shearer, eds. 1976); National Association for Retarded Citizens, National Forum on Residential Services (1976).

[41] The State of Pennsylvania has acknowledged and established priorities within its Office of Mental Retardation which heavily emphasize the need to provide services in community-based, noninstitutional settings. *See* Knowlton, *Group Homes,* in National Association for Retarded Citizens, National Forum on Residential Services 117 (1976). The author, who is the director of the Bureau of Community-Residential Services of the Pennsylvania Department of Public Welfare, outlines as "Priority I" support services necessary to keep a child at home, as "Priority II" adoptive and foster homes for children, and as "Priority III" community living arrangements. Institutions are the very last alternative listed and institutional confinement would only be used after a full exploration of all the other alternatives.

the hearing.[42] In the event that the state finds no suitable alternatives, it carries the burden of showing why the alternatives are not suitable. A second model would provide the resources necessary to explore alternatives directly to the hearing system. This could be accompiished either by establishing specific staff positions[43] or by the use of the services of a separate agency.[44]

Amici believe that the commitment of children to institutions without a thorough exploration of other alternatives

[42] *See e.g. Lessard* v. *Schmidt,* 349 F. Supp. 1078 (E.D. Wis. 1972), *remanded,* 414 U.S. 473 (1974), *reinstated,* 379 F. Supp. 1376 (E.D. Wis. 1974), *remanded,* 421 U.S. 957 (1975), *reinstated,* 413 F. Supp. 1318 (E.D. Wis. 1976). The state's investigation could be carried out by the social services staff of the institution or by the staff of local community mental health and mental retardation centers. *See generally* Chambers, *supra* note 2, at 1173-74. This approach also has the advantage of possibly removing the need to institute commitment procedures when mutually agreeable community services are found—perhaps even enabling the child to remain in his natural home because of the provision of support services in the community. *See Developments in the Law, supra* note 12, at 1250-51 n.265.

[43] This model parallels many juvenile court systems where judges rely on the advice received from their own probation staff. It is also similar to the practices of a number of criminal courts. This model has a positive effect of tying the power and prestige of the judge's office directly with the search for alternatives and may lead to the court's eventual involvement in the development of new alternatives. *See* Chambers, *supra* note 2, at 1173.

[44] In several states, advocacy groups, appointed to represent individuals at civil commitment hearings, employ social workers to assist in the exploration of alternative community services. Two such systems are the New York Mental Health Information Service and the Public Defender Service for the District of Columbia at St. Elizabeth's Hospital. *See* Chambers, *supra* note 2, at 1175-76. *See also* Stone, *supra* note 22, at 242.

would create a high probability of inappropriate commitments. Requiring hearings in the commitment process is a sensible approach to insuring that the needs of mentally disabled children are appropriately met.

C. The State's Parens Patriae Interests Substantially Coincide with the Individual's Liberty Interests, and the State's Interests in Economy and in Preserving the Family Unit Are Minimal; Thus, Balancing All of the Interests Affected By Civil Commitment Requires the Provision of Hearings.

The state's primary interest in children arises from its parens patriae power, which is exercised to ensure that the "best interests" of the child are protected. The Court has recognized that children are protected by the Constitution, *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), and specifically by the fourteenth amendment and the Bill of Rights.[45] *In re Gault*, 387 U.S. 1 (1967). However, the state can limit the rights of children in certain instances through the exercise of its parens patriae authority.[46] *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

---

[45] *See also Carey* v. *Population Services International*, 431 U.S. 678, 692 n.14 (1977), and cases cited therein.

[46] For a discussion of the special state interests which permit limitations on the freedom of minors, see Teitelbaum and Ellis, *supra* note 14, at 7-11. The reasons for these special interests include: the vulnerability of minors to harm; their lack of mature judgment; and, the maintenance of family authority. Thus, permissible state intervention can include: restricting dangerous religious activities of children; mandating school attendance; limiting access to objectionable or obscene materials; prohibiting child labor; and, restricting the use of alcohol. *Id.* at 6-8.

The Court has recognized, however, that the state's exercise of its parens patriae authority "is not an invitation to procedural arbitrariness." *Kent* v. *United States*, 383 U.S. 541, 555 (1966).

Similarly, when the state's intervention promotes the "best interests" of the child, the state can limit the control which parent(s) exercise over their child in certain circumstances.[47]

Amici believe that the state's interest as parens patriae substantially coincides with the private liberty interests of the child in the civil commitment process. Certainly, the child's interest in liberty in its most basic sense—the desire to be free from restrictions on bodily movement and from the harms of institutionalization, the avoidance of unnecessary lifelong stigma, and the need to grow and be nurtured in a setting which approximates as closely as possible a natural family situation—are also governmental interests. Similarly, there exists a strong state interest in avoiding inappropriate commitments of children to institutions when

---

[47] In upholding a restriction on children selling religious literature on the streets, the Court observed that

> Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.

Prince v. *Massachusetts*, 321 U.S. 158, 170 (1944). Under this rationale, the state may limit parental control, for instance, through child deprivation, neglect or abuse proceedings.

Recently this principle has been reiterated by the Court.

> To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.

Wisconsin v. *Yoder*, 406 U.S. 205, 233-34 (1972).

the child's best interests are more adequately served by alternative means.[48]

Amici submit that the parens patriae interests of the state actually militate in favor of the provision of due process hearings. Although the state may assert other interests which are not supportive of the provision of such hearings, such as the potential of harm to the family unit and the possibility of increased costs to the state, *amici* argue that these interests fall far short of overriding the various interests at issue which favor requiring hearings.

1. The Provision of Hearings Will Not Interfere with the State's Interest in the Maintenance of the Family Because the Parental Decision to Seek the Commitment of a Child to an Institution Has Already Weakened the Family Unit. The state has a strong interest in upholding the sanctity of the family and in maintaining parental control over the rearing of children. *Smith* v. *Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977); *Moore* v. *City of East Cleveland, Ohio*, 431 U.S. 494 (1977); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). However, *amici* argue that once the

---

[48] The hearing process is an effective way to quickly screen out individuals who should not be committed, without frustrating the state's ultimate goals in commitment. *Developments in the Law*, *supra* note 12, at 1278. The state's ultimate goal, however, is the child's best interests. *Amici* submit that the hearing process best pursues this goal by insuring that alternatives to commitment are explored.

> The concept of community based resources with the mentally disabled individual being retained in his home as much and as long as possible is the most appropriate social policy if we are to consider the child's best interest.

Stone, *supra* note 22, at 124.

parent(s) have sought the commitment of their child to an institution, the governmental interest in maintaining that particular family unit has already been severely weakened by the parental actions, and the state's interest in preserving familial relationships is thereby reduced.

In *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976), the Court rejected the state's claim that an unmarried minor must obtain parental consent prior to aborting her pregnancy.[49] The Court recognized that

---

[49] In his concurring opinion, Justice Stewart noted that

> a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt . . . judicial resolution of any disagreement between the parent and the minor. . . .

Id. at 90-91 (Stewart J., concurring). Thus, an absolute power in parent(s) to control the fundamental right of their child to seek abortion is unacceptable, yet a statute providing the parent with power to control the child's rights, subject to judicial review, might be acceptable. Similarly, in *Belloti* v. *Baird*, 428 U.S. 132 (1976), the Court abstained from deciding the constitutionality of a state statute governing the abortion of a minor.

> The picture thus painted by the respective appellants is of a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read, would be fundamentally different from a statute that creates a "parental veto."

Id. at 145.

This approach is consistent with the Court's decision in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). There, the Court distinguished the situation where parent(s) were preventing their children from attending school against the children's expressed desires to attend and did not address that issue in the decision. *Id.* at 231.

placing such authority in the hands of a parent would not accomplish the state's objective of safeguarding the family unit and parental authority because, when the parent(s) and child disagree over such a fundamental right affecting the child, the family structure has already been fractured.[50] *Id.* at 75.

In *Smith* v. *Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977), the Court considered the right of a minor to a judicial hearing prior to being removed from a temporary foster home placement (of more than eighteen months duration) and returned to his or her natural family. The district court held that it was in the child's interest to have an automatic hearing, because the child might be unable to request a hearing on his or her own and because the foster parents, acting in their own interests, might not request a hearing. The Court, in reversing this decision, recognized the state's interest in maintaining family privacy and autonomy. The Court reasoned that, when the foster parents do not request a hearing on behalf of the child,

> it is difficult to see what right or interest of the foster child is protected by holding a hearing to determine whether removal would unduly impair his emotional attachments to a foster parent who does not care enough about the child to contest the removal.

Id. at 850. *Amici* assert that the Court's refusal to require hearings to protect the child's liberty interest in maintaining a familial relationship within the foster home, under the rationale that the relationship has been severely weakened by the acquiescence of the foster parents to the

[50] "At least in cases involving fundamental rights, there must be some showing that denial of the child's liberty *will* strengthen the family unit; a bare allegation to that effect will not suffice." Teitelbaum and Ellis, *supra* note 14, at 12 (emphasis in original).

removal of the child, lays a foundation from which to consider the case at Bar.

In pursuing the commitment of their minor child, the natural parent(s)' actions seriously undermine the claim that the right of family autonomy should outweigh the child's fundamental rights which are affected by commitment.[51] As in *Danforth, supra,* the family structure may already be fractured.

When the issue addressed concerns the placement of the child in either his or her natural home or in a foster home, where the surrogate parent(s) have chosen not to exercise their right to request a hearing in which they seek to retain custody of the child, no hearing on the child's behalf is required. However, when the alternative the natural parent(s) are seeking is to relinquish their child to an institution, the best interests of the child are much more difficult to ascertain.[52] Thus, mandating hearings will best serve the state's interest in protecting the best interests

[51] For a thorough analysis of the child's liberty interest and potentially conflicting parental interests which concludes that, once the family reaches outside the home to treat the problem, the liberty interest takes precedence. see Teitelbaum and Ellis, *supra* note 14, at 14-22.

[52] Much evidence exists to indicate that a child's interests are not served by removal from a family situation and placement in an institution.

> Infants and children placed in institutions instead of being wanted in their own family, an adoptive or foster family, have an obvious disadvantage. Whatever beneficial qualities a psychological parent may be lacking, he offers the child the chance to become a wanted and needed member within a family structure; ordinarily this cannot happen even in the institutions where

(footnote continued)

of the child without interfering with the potentially competing interest of the state in maintaining the family.[53]

2. The State's Interest in Governmental Economy Is Illusory Because the Incremental Cost of Providing Automatic Hearings Will Be Marginal. The court below acknowledged in its decision that all of the due process procedures outlined would not be required in every case, and the court held that all of the child's rights could be waived except for notice and counsel (or trained advocate). It was thus assumed by the lower court that not every child would, in fact, receive a hearing.

On the other hand, the state legislative framework already provides for the provision of a substantial number of hearings. Each person, whether alleged to be mentally ill

(footnote continued)

care, safety, and stimulation may be provided, but where the individual child has no psychological parents.

Goldstein, Freud and Solnit, *supra* note 20, at 21. The Project on Classification of Exceptional Children, a study undertaken at the request of then Secretary of Health, Education, and Welfare Elliott Richardson, reached the conclusion that "the large, congregate residential institutions for children of all categories . . . should be closed and the children cared for in community-based programs." Hobbs, *supra* note 28, at 253. *See also,* Scheerenberger, *supra* note 19, at 19-39. *See generally* Joint Commission on Mental Health of Children, Crisis in Child Mental Health: Challenge for the 1970's (1969) (a report to Congress mandated by the Social Security Amendments of 1965 and 1968).

[53] The Court recently had before it another case in which a minor's fundamental interest—the right to procreate—was abridged by the actions of a parent in conjunction with physicians and a state court judge. *Stump* v. *Sparkman,* ..... U.S. ....., 98 S. Ct. 1099 (1978). While the case turned on the issue of judicial immunity, the facts illustrate the potential conflict between the parent(s) and the child. A judicial hearing, in which the child is afforded due process protections, would undoubtedly serve the best interests of the child, without further damage to the government's interest in family autonomy.

or mentally retarded, for whom application has been made for "involuntary" commitment, must be provided with a hearing. The provision of these hearings will not be affected by the decision of this Court. In addition, each allegedly mentally ill child under the age of fourteen receives a hearing if any responsible party files a petition for his or her release. Each mentally retarded child between the ages of thirteen and eighteen receives a hearing if he or she objects to institutionalization or notifies an attorney who subsequently requests discharge. Under the present legislative scheme, all children except those mentally retarded children below the age of thirteen could potentially have hearings.[54] Therefore, the theoretical prospect of a significant additional fiscal or administrative burden on the state may not be substantial.

Even assuming a significant increase in the number of hearings, the overall costs to the state will be minimized, if not transformed into savings, by the reduction in the number of children erroneously committed to institutions.[55]

[54] Of course, *amici* acknowledge that the existing commitment scheme is challenged in the case at Bar because of the heavy burden placed upon the child or "interested" third parties to obtain access to a hearing which *amici* argue should be constitutionally mandated.

[55] For a discussion of the benefits and cost reductions of providing community education and training services and of reducing the institutional population, which shows that community care is less expensive than institutional care and which outlines the increased societal productivity which results from deinstitutionalization, see Conley, The Economics of Mental Retardation (1973).

Pennsylvania is already under a court order to develop community services for all the mentally retarded residents of one of its institutions, as a result of the court's finding that residents should not be confined at Pennhurst State School and Hospital. *Halderman* v. *Pennhurst State School and Hospital,* 446 F. Supp. 1295 (E.D. Pa. 1977).

Since nearly all mentally retarded persons who are institutionalized are committed as minors and because the median period of institutionalization is nearly fifteen years,[56] the fiscal effect of reducing erroneous commitments can be staggering.[57]

III.

THE STATE SYSTEM GOVERNING THE COMMITMENT OF MINORS DOES NOT SUFFICE AS A SUBSTITUTE FOR REQUIRING HEARINGS AND FRUSTRATES THE GOAL OF PURSUING THE BEST INTERESTS OF HANDICAPPED CHILDREN.

A. Neither the Denial of Access to a Hearing Nor the Placement of the Burden of Affirmatively Exercising the Right to Request a Hearing Upon the Child or an Undetermined "Responsible Party" Provides Sufficient Protections for the Minor's Interests.

Under the state commitment system which is being scrutinized in the case at Bar, mentally retarded children under the age of thirteen are afforded absolutely no opportunity for a hearing in which to challenge their commitment.

---

[56] Cohen, *Advocacy*, in The Mentally Retarded Citizen and the Law 591, 599 (Kindred, ed. 1976), citing Department of Health, Education and Welfare, Mental Retardation Source Book 39, 47 (1972).

[57] Regardless of the cost factor in providing hearings, *amici* assert that the weight which this governmental interest is afforded should be minimal. Clearly, the increasing costs of criminal prosecutions cannot justify any significant relaxation of the constitutional rights of criminal defendants. Likewise, the liberty interest of the child and the concern for insuring that the child's best interests are served are of more import than the state's fiscal concerns.

Mentally retarded children who are thirteen or older receive notification of their rights and the telephone number of an attorney who can be called for representation. If the child objects to commitment, an involuntary commitment can be initiated which contemplates the provision of a hearing. Mentally ill children under the age of fourteen may only be withdrawn from the institution by their parent(s) or guardian(s); however, a "responsible party," acting in the child's best interests, may petition for a hearing on the child's behalf.

Focusing first upon mentally retarded children, *amici* argue that these provisions do little to safeguard the child's interests, and they do not constitute an adequate alternative to a mandatory due process hearing. *Amici* ask this Court to recognize that these mentally retarded children have a double disability: minority and handicapping condition. Upon being removed from his or her home, family and friends and placed in a strange institutional atmosphere, the child is likely to be extremely confused. Children in such a situation may find it very difficult to muster the initiative to contact an attorney or to object to the commitment and demand a hearing, especially when they may perceive such action as a challenge to their parent(s).

Additionally, the child's mental retardation further decreases the likelihood that the state's procedures will be invoked. By definition, mentally retarded persons suffer from an impairment in intellectual ability. Depending on the severity of retardation, the child may not even have the ability to comprehend the available procedures. If the child cannot speak or advocate on his or her own behalf, the availability of these procedures becomes mean-

ingless.[58] The child's functional or instinctive opposition to institutionalization will go unheeded, unless he or she has the intellectual ability to formulate a protest or to take action.

Similarly, the state's procedures for mentally ill children lack appropriate safeguards. Unless a "responsible party" wishes to initiate a hearing on behalf of the child, the child never receives the benefit of a review of the commitment. Along with mentally retarded children under the age of thirteen who never receive a hearing, mentally ill children under the age of fourteen are deprived of the right to hearings which would be especially beneficial to younger children. Since younger children are more helpless, more vulnerable to arbitrary and erroneous actions, and more likely to suffer irreparable harm, through loss of parental ties, deprivation of education, and lifelong stigmatization, during their prime periods of development,

[58] Even if a mentally retarded child has the ability to advocate on his or her own behalf, the child may be constrained from exercising that option. According to the report of the Task Force on Law of the President's Panel on Mental Retardation,

> [t]he retarded are particularly vulnerable to an atmosphere of threats or coercion, as well as to one of friendliness designed to induce confidence and cooperation. The retarded person may be hard put to distinguish between the fact and the appearance of friendliness. . . . Some of the retarded are characterized by a desire to please authority. . . .

Bazelon, Boggs, Hilleboe, and Tudor, Report of the Task Force on Law: The President's Panel on Mental Retardation (1963), cited in Menolascino, *supra* note 40, at 185. Menolascino further notes that, especially in situations filled with anxiety, "[o]ften the retarded individual does not fully comprehend his situation, nor, because of his intellectual deficit, can he handle his frustration." *Id.* at 186. *See also* Person, *The Accused Retardate*, 4 Col. Hum. Rts. L. Rev. 239, 254 (1972).

hearings are necessary to ensure that their best interests are protected.[59]

The state recognizes that adults and mentally ill children who are over fourteen years of age can choose whether to be voluntarily institutionalized; if they do not consent to commitment, they can only be institutionalized after a mandatory hearing. Yet, all mentally retarded children and younger mentally ill children, who would benefit most from having a mandatory due process hearing, are afforded no such right. As to these children, the state has either created obstacles which realistically minimize the opportunity for a hearing, or the state has unilaterally denied the individual's access to the protections of the hearing. *Amici* believe that these arbitrarily drawn statutory lines are to the detriment of mentally disabled children.

[59] Dr. Eli Messenger, in testifying before the lower court in its first consideration of this matter, *Bartley* v. *Kremens*, 402 F. Supp. 1039 (E.D. Pa. 1975), *vacated and remanded*, 431 U.S. 119 (1977), stated:

> I think in fact that the need for a hearing in the younger children is greater, because one cannot fully expect them to understand fully, certainly in legal terms, their dilemna, nor can they be aware of alternate forms of therapy. . . . I think that because younger children are less sophisticated and less knowledgeable, that we have to bend over backwards to protect their rights.

Appendix at 631a, cited in *Institutionalized Juveniles* v. *Secretary of Public Welfare*, No. 72-2272, slip op. at 35 (E.D. Pa. May 25, 1978), *prob. juris. noted*, ... U.S. ....., 98 S. Ct. 3087 (1978). Similarly, Dr. Henry Kandler, an expert who also testified at the first trial, has indicated: "I also believe that there should be no lower age limit—children younger than 13 need more protection, if anything, since they are more helpless." National Juvenile Law Center, Legal Challenge to the "Voluntary" Admission of Children to Mental Institutions, Vol. II, at 276 (1976). *See also* Teitelbaum and Ellis, *supra*, note 14, at 34-35.

B. The Safeguards Claimed by the State in Requiring a Referral from a Professional and a Review by the Director of the Institution Do Not Constitute an Adequate Substitute for a Due Process Hearing.

Under the state system, a mentally retarded child may be admitted to an institution upon the referral of a pediatrician, general physician or psychologist. *Amici* submit that such professionals generally play a significant role in influencing the parent(s)' decision to institutionalize their child, either by suggesting and encouraging the commitment or by supporting the parent(s)' initial decision to commit.[60] Yet, there is much evidence to indicate that the opinions of these professionals are frequently not based upon an expertise of mental retardation, nor are they always made with the child's best interest in mind.

Summarizing the recent philosophy in this area, Dr. Frank Menolascino, a nationally recognized expert in the field of mental retardation and past president of the National Association for Retarded Citizens, states: "It was thus common in the not too distant past for professionals to advise parents to remove a mentally retarded child from

[60] *See e.g.*, Downey's study in 1965 which concluded that "a physician's recommendations were a major influence among all parents [in their decision to commit their child]." Scheerenberger, *supra* note 19, at 134. A California study of family decisions to institutionalize children found that professionals, especially medical doctors, almost uniformly advised placement in an institution, and "[a]ll but five of the 83 families who had admitted their children to state hospitals or had applied for admission did so upon professional advice." Kay, Farnham, Karren, Knakal and Diamond, *supra* note 31, at 486. *See also* Teitelbaum and Ellis, *supra* note 14, at 44-47.

the hospital or home and to sever all emotional ties with the retarded family member." [61]

The bias towards institutionalization and the lack of information about the current developments in the area of mental retardation cut across all areas of specialty. Parents of mentally retarded children will encounter this prolem in their initial contacts with obstetricians [62] and pediatricians.[63] Later, contacts with general physicians [64]

[61] Menolascino, *supra* note 40, at 92.

[62] [W]e concluded that there is a growing trend favoring home care of every young child whenever possible. However, many including most of the obstetricians interviewed (who have perhaps least contact with retarded children, but whose opinion may weigh most heavily with parents at that traumatic time of first discovery of an apparent impairment)—still urge institutionalization of retarded children under 6, even in the face of parental objection (especially in the case of the mongoloid child, whom they view with despairing negativism). In fact, a majority of obstetricians said they would recommend institutionalization of *all* infants recognized as retarded where there are other children in the home.

Allen, *supra* note 30, at 13-14 (emphasis in original).

[63] [T]hough pediatrics has recently taken an active role in mental retardation (via the university-affiliated mental retardation centers), there are relatively few developmentally oriented pediatricians who are strongly identified with the field of mental retardation.

Menolascino, *supra* note 40, at 60-61.

[64] A recent study illustrates that, although the family doctors may be the primary source of information and care, they may not be knowledgeable about alternatives to institutionalization, nor about the advisability of investigating such alternatives.

The study found that a large number of pediatricians and gen-

(footnote continued)

or psychiatrists [65] will not alter this woeful situation.

Thus, the referral which accompanies the child to the institution cannot be perceived as an effective safeguard against erroneous commitment which eliminates the need for a due process hearing. Likewise, a review by the institutional director will not be a sufficient substitute for a hearing. Such reviews commonly consist of an admission interview, which is performed by a staff psychiatrist or physician.

Whether the child is mentally ill or mentally retarded, he or she faces a situation which is heavily weighted towards the overprediction of illness or disability, and in which the physician may perceive that there is little choice but to authorize commitment.[66] Physicians are taught and

(footnote continued)

> eral practitioners were unfamiliar with the local services for the retarded. In addition, 80% of the physicians were still recommending institutionalization for some of their patients who are severely or profoundly retarded, and 54% are making such recommendations for the moderately retarded. If the sample is representative, then it would appear that many physicians are working at cross purposes with other professionals in the field of mental retardation.

Kelly and Menolascino, *Physicians' Awareness and Attitudes Toward the Retarded,* Mental Retardation, Vol. 13, No. 6, at 13 (Nov./Dec. 1975).

[65] Dr. Menolascino, himself a psychiatrist, indicates that it is common to find a

> lack of knowledge among psychiatrists concerning therapeutic possibilities and the necessary components of meaningful programs for the retarded. . . . This lack of understanding is stressed because it has probably led directly to the psychiatrist's misdirected defense of the tragic models of care which have recently been so clearly condemned.

Menolascino, *supra* note 40, at 55-56.

[66] *See* Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions,* 62 Calif. L. Rev. 840, 863-68 (1974).

practice under a medical model which rests upon the principle that "judging a sick person well is more to be avoided than judging a well person sick." [67] When a child is presented to the physician at the institution, the physician will tend to overpredict the need for commitment; by so doing, he or she greatly reduces the professional consequences of an erroneous decision.[68]

In addition, the admitting physician is generally approached by parent(s) who are requesting the admission of their child and who may have a referral from a physician or other professional in the community. The admitting physician faces the alternative of routinely admitting the child or rejecting the referral and telling the parent(s) to return home with the child. There is little opportunity to investigate the factual situation or the home environment, or to explore the possible alternatives to commitment. The admitting physician is essentially faced with a fait accompli. All the concerns about the appropriateness of the placement which should be raised at the point of admission, and which the institutional director might ideally wish to raise, can only be properly considered in a due process hearing.

[67] Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions,* 23 J. Leg. Educ. 24, 46-47 (1970). *See also* Stone, *supra* note 22, at 49.

> Despite massive empirical evidence that long term confinement is debilitating the view persists among many practitioners that "there is no harm in playing it safe" by recommending commitment when there is the slightest suggestion it may be helpful.

[68] Peterson and Seo, *Bayesian Analysis of Overprediction of Insanity,* 34 Psychol. Rep. 207 (1974). An erroneous decision to commit will probably go unnoticed in that no hearing occurs and, if the child is subsequently released, the physician can take credit for the "improvement" in the child's condition. On the other hand, an erroneous decision not to commit could subject the physician to subsequent exposure if the child's condition worsens or if an incident occurs in the community.

C. The Informal System Created by the State for the Commitment of Minors without Mandatory Due Process Hearings Encourages the Widespread Usage of Institutionalization, Which Is Contrary to the Best Interests of Handicapped Children.

The implications of this Court's decision for all handicapped children will be vast. Historically, the civil commitment process has been conducted informally, with a view toward administrative convenience. However, an increasing number of courts, following the Court's previous pronouncements with regard to the juvenile justice system, are now carefully scrutinizing the commitment process and demanding the application of strict due process procedures.[69]

Mentally ill and mentally retarded children, as well as children with epilepsy, cerebral palsy and other physical handicaps have been traditionally subjected to lifetimes of institutionalization.[70] This Court's decision will indi-

---

[69] *Amici* wish to reemphasis that this Court need not decide the full extent of procedural due process protections which must attach to the commitment of minors. The case at Bar presents only the question of whether some form of due process hearings are constitutionally required. Definitions of many of the specific procedural elements of such hearings should be left for future cases. *E.g. State* v. *Addington*, 557 S.W.2d 511 (Tex. 1977), *prob. juris. noted*, ... U.S. ....., 98 S. Ct. 1604 (1978) (No. 77-5992) (appropriate standard of proof in civil commitments); *see generally* discussion, note 1, *supra*.

[70] *See generally* Commission For the Control of Epilepsy and Its Consequences, The Plan For Nationwide Action on Epilepsy (1977) (on epilepsy); Kugel, *Introduction*, in President's Committee on Mental Retardation, Changing Patterns in Residential Services For the Mentally Retarded 3, 5 (Kugel and Shearer, eds. 1976) (on mental retardation, cerebral palsy and other physical disabilities); Blatt, Souls in Extremis: An Anthology on Victims and Victimizers (1973) (on mental retardation).

cate whether the Court encourages a return to the routine institutionalization of handicapped children, or whether instead the Court supports the growing recognition and movement towards the provision of community services to, and the social integration of, handicapped children.

If the Court condones an informal administrative process, it will be encouraging the creation of a "greased runway"[71] leading to the incarceration of handicapped children in institutions. The Court's decision will be a signal to parents as to the degree of concern they must exercise prior to the commitment of their child. Similarly, the Court's ruling will indicate to the state how far it must go in ensuring that appropriate community services and facilities are made available to handicapped children. A lax procedural process will undoubtedly minimize the scrutiny which is given to future civil commitments.[72]

The evidence concerning the loss of fundamental rights, the potential of harm to the individual's development and the lifelong stigma which can result from institutionalization is abundantly clear. Equally evident is the trend toward the protection of the rights and best interests of handicapped children through the focus on community-based services. If the child's best interests are to be served, it can only occur through the establishment of a

---

[71] *State ex rel. Memmel* v. *Mundy*, No. 441-417 (Cir. Ct. Wis. August 8, 1976), *appealed on other grounds*, 75 Wis. 2d 276, 249 N.W.2d 573 (1977). This decision vividly describes how informal procedures can result in erroneous commitments and massive deprivations of rights.

[72] *See* Stone, *supra* note 22, at 122. "It seems clear that the only reasonable legal, medical, and ethical policy to follow is one which is directed towards making entry into such large total institutions as difficult as possible."

procedural device to insure against the errors which have occurred in the past—as in numerous other cases decided by the Court, that procedural device is a due process hearing.

CONCLUSION

For the reasons discussed in this brief, *amici* respectfully request this Court to affirm the decision of the United States District Court for the Eastern District of Pennsylvania.

Respectfully submitted,

RONALD M. SOSKIN
Counsel for amici curiae
National Center for Law and
the Handicapped, Inc.
1235 North Eddy Street
South Bend, Indiana 46617
(219) 288-4751

Of Counsel:
BRIAN J. LINN